FiveCAP, Inc. *and* General Teamsters Union Local No. 406, International Brotherhood of Teamsters, AFL–CIO. Cases 7–CA–39503, 7–CA–40230, 7–CA–40465, and 7–CA–40721

October 31, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On December 17, 1998, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief, as well as an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified herein,[3] and to adopt his recommended Order as modified and set forth in full below.

1. The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by placing employee Florence Feliczak on probation after she had returned to work from a lawful suspension imposed by the Respondent. We reverse this finding and dismiss this allegation for the reasons stated below.

Feliczak worked for the Respondent as a data entry clerk.[4] On Friday, February 7, 1997,[5] when Feliczak was not at work, the Respondent sought access to information that Feliczak had stored on a file in her computer. Feliczak had put a password on this file so that other employees could not access it. When the Respondent's executive secretary, Theresa Lombard, called Feliczak at home requesting her password, Feliczak refused to provide this information claiming both that Lombard was not her direct supervisor and that she could not remember it. Later that day, Russell Pomeroy, the Respondent's fiscal officer, called Feliczak to get the password but Feliczak was not at home. During the investigation of Feliczak's refusal to give her password to Lombard, Feliczak responded that she had "got them" by failing to provide it. On February 13, Pomeroy placed Feliczak on suspension for 6 workdays because of this incident. The judge found that the Respondent had previously instructed Feliczak not to put passwords on files stored in her computer and that, therefore, the Respondent lawfully suspended her for job misconduct. As noted, no exceptions were filed to this finding.

When Feliczak returned to work on March 3, Pomeroy met with her in order to clarify Feliczak's work duties and responsibilities. Pomeroy later gave Feliczak a letter stating that she was not to loiter and disrupt staff and that she was to stay at her work station, as the Respondent

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In some instances the judge found violations of Sec. 8(a) without stating that the conduct also violated Sec. 8(a)(1). It is well settled that a violation by an employer of any of the four subdivisions of Sec. 8(a) other than subdivision (1) is also a violation of subdivision 1. 3 NLRB Annual Report 52 (1938). Therefore, we shall treat all of his findings of violations of Sec. 8(a), other than Sec. 8(a)(1), as violations of that sec. as well.

[2] We reject the Respondent's argument that it is exempt from the Board's jurisdiction as a political subdivision for the reasons stated in the Board's prior decision involving these parties reported at 331 NLRB No. 157, slip op. at 1–4 (2000).

In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by refusing to bargain regarding the elimination of Florence Feliczak's data entry clerk position and her resulting layoff, we rely on *Plymouth Locomotive Works*, 261 NLRB 595, 602–603 (1982), in which the employer, as here, unilaterally eliminated a bargaining unit position following the union's certification. The case relied on by the judge, *Holy Cross Hospital*, 319 NLRB 1361 fn. 2 (1995), is not precisely apposite in that it involved the employer's unilateral elimination of a job classification that was in the contractual unit and that the Board had addressed and had specifically retained in the unit during a unit clarification proceeding.

No exceptions were filed to the judge's findings that the Respondent did not violate the Act as follows: by instituting a confidentiality policy; by unlawfully reducing employee Florence Feliczak's workweek and later suspending her in February 1997; and by denying employee Melissa Kukla classroom materials on her return to work in the fall of 1997, by withholding and limiting the assistance of teacher's aides to Kukla, by excluding Kukla from a staff meeting, and by affording Kukla disparate treatment when it scrutinized and criticized her work in November 1997.

[3] We find merit in the General Counsel's cross-exceptions regarding the judge's failure to conform his recommended Order and notice with the violations found in this case. Thus, we shall include provisions in the Order requiring that the Respondent rescind the disciplinary letter issued to employee Melissa Kukla on October 16, 1997, remove any reference to such discipline from its personnel and employment records, and offer Kukla immediate reinstatement to her former position because of her unlawful constructive discharge in February 1998. We shall also modify the judge's notice to include affirmative provisions that the Respondent will take the action specified above, as well as reinstate Florence Feliczak to her former job and make whole both Feliczak and Kukla for any loss of earnings and other benefits resulting from the Respondent's conduct, and meet and bargain collectively with the Union regarding the elimination of unit positions and the reassignment of unit employees. Also, we shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc*., 325 NLRB 17 (1997).

[4] Feliczak did not testify at the hearing.

[5] All dates are in 1997, unless otherwise noted.

had received complaints from other employees about her bothering them. Pomeroy's letter also informed Feliczak that her "employment status [was] probationary and there will be no more warnings" and that she was to submit a summary of her accomplishments at the end of each day.

The judge found that the Respondent did not violate the Act by placing restrictions on Feliczak when she returned to work. We agree with the judge for the reasons he stated. However, the judge further concluded that the Respondent had violated Section 8(a)(3) by placing Feliczak on probation in retaliation for her union activities. Contrary to the judge, we find that the Respondent's decision to put Felizcak on probation flowed directly from her serious job misconduct in restricting access to files in her computer and then refusing to divulge the password to her superiors when directed to provide it. We stress that the Respondent informed Feliczak that she was on probation immediately after she returned from her lawful suspension. By contrast, although Feliczak was a union supporter during the 1994–1995 organizing campaign and the Respondent evidently knew that,[6] and has exhibited considerable animus toward its employees' union activities, Feliczak's relatively minor union activities were far removed in time from the Respondent's decision to put her on probation in February 1997. For these reasons, we conclude that the General Counsel has failed to meet his burden to establish under *Wright Line*[7] that Feliczak's earlier union activities were a motivating factor in the Respondent's disciplinary action. Accordingly, we dismiss this complaint allegation.

2. The judge noted that the General Counsel had argued in his trial brief that the Respondent unlawfully refused to allow employee Melissa Kukla to use a lesson plan that had been prepared by the teacher she had replaced and which the Respondent had allegedly previously approved. The judge concluded that "[t]here is no evidence to support this assertion, nor was it alleged as an unfair labor practice." The judge specifically found that the Respondent had informed Kukla that it had not previously approved the plan, that Kukla then submitted it for approval as the Respondent had directed, and that the Respondent had approved it. Nonetheless, the judge concluded that, by this conduct, the Respondent had unlawfully "harassed" Kukla in violation of the Act. We find no harassment in the Respondent's treatment of Kukla in this instance and, therefore, we reverse the judge's finding of this unalleged and unsupported violation.

3. The judge found that the Respondent had violated Section 8(a)(3), (4), and (1) of the Act by requiring that Kukla provide a second physician's note as a condition to returning to work on October 17. We agree with the judge's finding of a violation for the reasons set forth below.

The evidence shows that on October 14, Kukla was absent from work because the Board had subpoenaed her to appear as a witness in a Federal district court proceeding. On October 15, Kukla called in sick and went to see her chiropractor. When Kukla reported for work on October 16, the Respondent required her to produce her Board subpoena and a note from the chiropractor. Kukla left work and returned 90 minutes later with the subpoena and the required doctor's note. The judge found, and we agree, that the Respondent violated Section 8(a)(3), (4), and (1) of the Act by creating an ad hoc policy in order to impose these requirements on Kukla in retaliation for her union activities and her testimony at the district court proceedings initiated by the Board. For the same reason, we also adopt the judge's finding that the Respondent further violated Section 8(a)(3), (4), and (1) of the Act later on October 16 by issuing Kukla a disciplinary warning because she did not provide the Respondent with a copy of her Board subpoena in advance of the court proceeding.

Although the Respondent permitted Kukla to work on October 16, Manager Melba White informed Kukla the next day that her doctor's note did not meet the Respondent's requirements. White said that Kukla would have to obtain a second note from her chiropractor stating that she was physically capable of working with the young children who attend the Respondent's head start program before she could return to work. The General Counsel clearly met its *Wright Line*[8] burden of showing that Kukla engaged in union activities, that the Respondent was aware of them, that the Respondent had animus towards her union activities, and that the Respondent's action in requiring Kukla to obtain a second note was motivated in part by its union animus. Based on the Respondent's failure to establish that it had any practice of requiring employees who missed work due to illness to present such a doctor's note before returning to work, we agree with the judge that the Respondent has failed to establish that it would have imposed this requirement on Kukla in the absence of her union activities. Accordingly, we find that the Respondent also violated Section

[6] The record shows that Feliczak's supervisor was present when she received a subpoena to testify on the Union's behalf at the February 1995 representation hearing.

[7] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

[8] Id.

8(a)(3), (4), and (1) of the Act by its disparate treatment of Kukla in this manner.

4. The judge found that the Respondent violated Section 8(a)(3), (4), and (1) of the Act by constructively discharging Kukla on February 19, 1998. The Respondent previously had unlawfully refused to recall Kukla as a home start teacher for the 1995–1996 school year and did not reinstate her to a teaching job until August 1997, pursuant to a court order issued under Section 10(j) of the Act. The Respondent, on Kukla's return, then perpetrated a course of systematic conduct that was calculated to interfere with Kukla's efforts to perform her job and culminated in her constructive discharge in February 1998. Thus, we have found that, during the 6-month period that Kukla worked following her reinstatement under court order, the Respondent violated Section 8(a)(3), (4), and (1) of the Act by its treatment of her as follows: (a) restricting her movements and access to supplies by requiring her to give advance notice before coming to the Respondent's main office to use its laminating equipment; (b) rescinding permission previously granted her to take time off so that she could act as a union representative during contract negotiations; (c) requiring that she provide a copy of her Board subpoena in order to excuse her absence to attend a Federal district court proceeding, and a doctor's note to justify her visit to a chiropractor; (d) issuing her a disciplinary warning for failing to provide the Respondent with the Board's subpoena in advance of her appearance at court proceedings; (e) requiring a second note from a chiropractor to ensure the Respondent that she was physically capable of returning to work; (f) rescinding approval for her to take off work for personal time; (g) accusing her of theft to law enforcement authorities; (h) placing new work restrictions on her by requiring her to keep her classroom door open when no children were present; and (i) reassigning her to work as a teacher's aide instead of a teacher.

Assessing these violations cumulatively, we find that the record clearly demonstrates that the Respondent engaged in a pattern of misconduct designed to harass Kukla or make her working conditions so unpleasant that she would quit, and that it did so in retaliation for her union activities and her testimony at prior Board proceedings. We particularly stress the evidence that, immediately preceding her constructive discharge, the Respondent unlawfully removed Kukla from the classroom in which she was teaching preschoolers and reassigned her to work as a teacher's aide with different children. The record plainly reveals the emotional distress that the Respondent inflicted on both Kukla and the children she taught after the Respondent separated them in midterm, without any plausible justification for its action, in its final endeavor to drive Kukla from the workplace. As the Board stated in *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976), the standards for finding a constructive discharge are:

> First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.

For the reasons stated above, we conclude that the Respondent's widespread discrimination against Kukla was intended to force her resignation and that the Respondent imposed these burdens on Kukla as retribution for her union activities. We therefore conclude that the General Counsel has established a case of constructive discharge here and that the Respondent has not met its *Wright Line*[9] burden of rebutting it, i.e., it has not shown that the changes would have taken place even in the absence of Kukla's protected activities.[10]

CONCLUSIONS OF LAW

1. FiveCAP, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By rescinding previously granted permission for personal time off, by requiring the production of subpoenas and doctors' statements in order to return to work where such is not required by personnel policies and procedures, by giving unwarranted disciplinary warnings, by accusing employees of theft to law enforcement authorities, by placing new and unwarranted restrictions on employees' use of facilities, by reassigning employees in retaliation for their having engaged in activity protected by the Act, by placing petty restrictions on employees' use of office equipment, and by constructively discharging employees, the Respondent violated Section 8(a)(3), (4), and (1) of the Act.

3. By refusing to notify and bargain with the Union concerning the elimination of bargaining unit jobs and the reassignment of unit employees, the Respondent violated Section 8(a)(5) and (1) of the Act.

4. These unfair labor practices are unfair labor practices that afffect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section

[9] Id.

[10] See *Pioneer Recycling Corp.,* 323 NLRB 652, 660 (1997); *La Favorita, Inc.*, 306 NLRB 203, 205–206 (1992), enfd. 977 F.2d 595 (10th Cir. 1992).

8(a)(1), (3), and (5) of the Act, we shall order that it cease and desist and take certain affirmative action necessary to effectuate the policies of the Act.

Having found that the Respondent unlawfully disciplined employee Melissa Kukla on October 16, 1997, and thereafter constructively discharged her about February 19, 1998, we shall order the Respondent to remove from its files any reference to Kukla's unlawful warning and constructive discharge, and to notify her in writing that this has been done and that neither the warning nor the constructive discharge will be used against her in any way. Having found that the Respondent constructively discharged Kukla and unlawfully refused to bargain with the Union regarding Feliczak's layoff, we shall also order that the Respondent offer Kukla and Feliczak immediate and full reinstatement to their former jobs and make them whole for any loss of earnings they suffered as a result of the Respondent's conduct, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1997). Finally, having found that the Respondent refused to notify and bargain with the Union regarding the elimination of bargaining unit jobs and the reassignment of unit employees, we shall order that the Respondent, on request, meet and bargain with the Union on these matters.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, FiveCAP, Inc., Scottville, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to notify and bargain with the Union concerning the elimination of bargaining unit jobs and the reassignment of unit employees.

(b) Interfering with employees' right to engage in activity protected by the Act by rescinding previously granted permission for personal time off.

(c) Interfering with employees' right to engage in activity protected by the Act by requiring the production of subpoenas and doctors' statements in order to return to work where such is not required by personnel policies and procedures.

(d) Interfering with employees' right to engage in activity protected by the Act by giving unwarranted disciplinary warnings.

(e) Harassing employees because they engage in activity protected by the Act by accusing them of theft to law enforcement authorities.

(f) Harassing employees because they engage in activity protected by the Act by placing new and unwarranted restrictions on their use of facilities.

(g) Reassigning employees in retaliation for their having engaged in activity protected by the Act.

(h) Harassing employees because they engage in activity protected by the Act by placing petty restrictions on their use of office equipment.

(i) Constructively discharging employees because they engage in activity protected by the Act.

(j) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with the Union as the exclusive representative of our bargaining unit employees regarding the elimination of unit positions and the reassignment of unit employees. The bargaining unit is:

> All full-time and regular part-time teacher aides, weatherization laborers, bus drivers, clerks, kitchen aides, drivers for the Tasty Meals program, assistant cooks, program information specialists, county community support service workers, field supervisors/pre-inspectors, post inspectors, crew leaders, head cooks, Head Start teachers, and assistant community workers employed by the Respondent at its facilities in Lake, Manistee, Mason and Newaygo Counties, Michigan; but excluding executive directors, Mason County Director for Head Start, Head Start head teachers, fiscal officers, community support directors, weatherization directors, Head Start administrative assistants, fiscal clerks, Head Start parent education coordinators, Head Start disability service coordinators, guards, and supervisors as defined in the Act.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warning and discharge of Melissa Kukla, and within 3 days thereafter notify Kukla in writing that this has been done and that neither the warning nor the discharge will be used against her in any way.

(c) Within 14 days from the date of this Order, offer Florence Feliczak and Melissa Kukla full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make them whole for any loss of earnings and other benefits they suffered as a result of the discrimination against them, in the manner set forth in this decision.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by Region 7, post at its various facilities copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 10, 1997.

(g) Within 21 days after service by the Region, file with the Regional Director in a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to notify and bargain with General Teamsters Union Local No. 406, International Brotherhood of Teamsters, AFL–CIO, in the collective-bargaining unit described below concerning the elimination of unit jobs and the reassignment of unit employees.

WE WILL NOT interfere with employees' right to engage in activity protected by the Act by rescinding previously granted permission for personal time off.

WE WILL NOT interfere with employees' right to engage in activity protected by the Act by requiring the production of subpoenas and doctors' statements in order to return to work where such is not required by personnel policies and procedures.

WE WILL NOT interfere with employees' right to engage in activity protected by the Act by giving unwarranted disciplinary warnings.

WE WILL NOT harass employees because they engage in activity protected by the Act by accusing them of theft to law enforcement authorities.

WE WILL NOT harass employees because they engage in activity protected by the Act by placing new and unwarranted restrictions on their use of facilities.

WE WILL NOT reassign employees in retaliation for their having engaged in activity protected by the Act.

WE WILL NOT harass employees because they engage in activity protected by the Act by placing petty restrictions on their use of office equipment.

WE WILL NOT constructively discharge employees because they engage in activity protected by the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL bargain collectively, on request, with the Union as the exclusive representative of our employees in the bargaining unit described below regarding the elimination of unit positions and the reassignment of unit employees. The bargaining unit is:

> All full-time and regular part-time teacher aides, weatherization laborers, bus drivers, clerks, kitchen aides, drivers for the Tasty Meals program, assistant cooks, program information specialists, county community support service workers, field supervisors/pre-inspectors, post inspectors, crew leaders, head cooks, Head Start teachers, and assistant community workers employed by the Respondent at its facilities in Lake, Manistee, Mason and Newaygo Counties, Michigan; but excluding executive directors, Mason County Director for Head Start, Head Start head teachers, fiscal officers, community support directors, weatherization directors, Head Start administrative assistants, fiscal clerks, Head Start parent education coordinators, Head Start disability service coordinators, guards, and supervisors as defined in the Act.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful warning and constructive discharge of Melissa Kukla, and WE WILL, within 3 days thereafter, notify Kukla in writing that this has been done and that neither the warning nor the discharge will be used against her in any way.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, within 14 days from the date of the Board's Order, offer Melissa Kukla and Florence Feliczak immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make them whole for any loss of earnings and other benefits resulting from our unlawful conduct, less any net interim earnings, plus interest.

A. Bradley Howell, Esq., for the General Counsel.
Richard D. McNulty, Esq., of Lansing, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Ludington, Michigan, on various days between May 11 and July 8, 1998, upon the General Counsel's consolidated complaint, which alleged violations of the National Labor Relations Act (Act).

The Respondent generally denied that it committed any violations of the Act and affirmatively contends the complaint should be dismissed because it is not an employer within the meaning of Section 2(2) of the Act.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following findings of fact, conclusions of law, and recommended Order.

I. JURISDICTION

The Respondent is a nonprofit corporation with its principal office at Scottville, Michigan. It is a community action agency engaged to administer various State and Federal antiproverty programs in Manistee, Mason, Lake, and Newaygo counties. The Respondent annually receives gross revenues in excess of $1 million and receives Federal funds directly from outside the State of Michigan in excess of $50,000.

The Respondent denies that it is an employer within the meaning of Section 2(2) of the Act on grounds that it is a governmental agency. The Respondent's board of directors is comprised of three groups—one third are community leaders, one third are county public officials, and one third are representatives of the poor who are elected by the constituency served by the Respondent.

In an earlier decision involving these parties,[1] Administrative Law Judge Fish found that the election procedure used to select the representatives of the poor was not democratic. Thus the Supreme Court's "responsible to the general electorate" test set forth in *NLRB v. Natural Gas Utility District of Hawkins County,* 402 U.S. 600 (1971), had not been met and the Respondent was therefore an employer under Section 2(2) of the Act. Judge Fish did suggest, however, that unless the Board changed its interpretation of the *Hawkins* test, the Respondent could avoid jurisdiction by changing its election procedure. The Respondent did so. However, so did the Board, in *Enrichment Services Program, Inc.,* 325 NLRB 818 (1998).

While those members of the board of directors who represent the poor are democratically elected from the constituency served by the Respondent, they are not responsible to the general electorate. Nor is the one-third of the Board composed of community leaders. Therefore I conclude that a majority of the Respondent's board of directors is not responsible to the general electorate and the Respondent is not any kind of a "political subdivision" excluded from Section 2(2) under the test of *Hawkins County*. The Respondent is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

General Teamsters Union, Local 406, International Brotherhood of Teamsters, AFL–CIO (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

The facts of this dispute preceding those of the events in issue here are set forth in detail in Judge Fish's decision. In brief, an organizational campaign began in the Fall of 1994, cumulating in an election on April 28, 1995, which was won by the Union 38 to 2 with 23 challenges. Judge Fish found that the Respondent engaged in extensive violations of the Act, including threats, coercive interrogation, impression of surveillance, maintenance of an overly broad no-solicitation/no-distribution rule, discharging employees because of their union activity and because they testified at a Board proceeding, bypassing the Union, and implementing changes in wages and working conditions. The General Counsel has sought and received injunctive relief under Section 10(j) of the Act, and has filed petitions seeking contempt citations for alleged violations of Federal district court orders. While none of this tends to prove or disprove any of the allegations in this case, this background shows that the allegations here did not occur in a vacuum, but are the continuation of a contentious and ongoing dispute.

B. Analysis and Concluding Findings

It should be noted that from the beginning, the Respondent, through its agents, has demonstrated monumental intransigence to its employees' exercise of their statutory rights. Although I have concluded that the facts of record, and/or the legal authority, do not support all of the allegations in the consolidated complaint, in general the Respondent continues to commit unfair labor practices unabated, including retaliating against those employees who have exercised their statutory right. The Respondent is a quasi-public agency, which exists primarily to administer Federal programs with Federal funds. Yet to the date of the hearing here, it has refused to abide by basic Federal statutes.

1. The confidentiality policy

It is alleged that on August 14, 1997, the Respondent promulgated the following written rule: "(H)appenings within FiveCAP, Inc. *must not be discussed outside of FiveCAP, Inc.*" and

[1] JD(NY)–21–96, decided January 31, 1997, on exceptions and pending a decision of the Board at the time of this decision.

that on February 9, 1998, Foley reiterated and repromulgated this rule.

The sentence in issue is in a broad "Confidentiality Policy" promulgated by the Respondent in 1996 (well before the 10(b) here) but repromulgated on September 2, 1997, when Melissa Kukla was rehired and as a condition was required to sign the "Acceptance of Employment Agreement" which contained the following:

Confidentiality Policy

* * *

> The absolute necessity for maintaining secrecy regarding FiveCAP, Inc. and its business, as well as the client's affairs, is a fundamental policy with FiveCAP, Inc. This means that happenings within FiveCAP, Inc. *must not be discussed outside of FiveCAP, Inc*. All employees, as and when engaged will sign the "Confidentiality Policy" as shown hereunder.
>
> In consideration of my employment with FiveCAP, Inc., I solemnly pledge myself upon honor, as if I were under oath, to divulge to no one, except such officers or employees of FiveCAP, Inc. as are entitled thereto, any information, which can, by a reasonable interpretation, be deemed confidential, acquired through my connections with FiveCAP, Inc.

The General Counsel argues that the language in the first paragraph would preclude employees from discussing wages, hours, and other terms and conditions of employment with interested third parties, such as union representatives. Therefore, the language goes beyond keeping confidential matters relating to the Respondent's clients and is unlawful. *Radisson Plaza Minneapolis,* 307 NLRB 94 (1992). The General Counsel also notes that this policy is worded differently from that previously in effect or the one tentatively agreed to in negotiations; however, the significance of these facts is not apparent. In any event, the policy as promulgated, and repromulgated with the hire of Kukla, either is or is not valid.

The Respondent contends that when read in context, this language is clearly meant to prevent employees from discussing client information with outside third parties and is therefore not violative of the Act, citing *Aroostook County Regional Ophthalmology Center v. NLRB,* 81 F.3d 209 (D.C. Cir. 1996).

Though broad in scope, it appears that the limiting language in the second paragraph renders the total clause permissible. That is, employees agree not to divulge "any information, which can, by a reasonable interpretation, be deemed confidential." I do not believe that employees would reasonably interpret such matters as wages, hours, and other terms and conditions of employment to be confidential. Therefore, I cannot conclude that on its face this clause is unlawful. And there is no allegation that it has been construed as a blanket prohibition, by discipline or otherwise. Thus I conclude that the allegations in paragraph 10 have not been sustained.

2. Allegations involving Florence Feliczak

a. Reduced workweek on February 3, 1997

Florence Feliczak began working for the Respondent on September 21, 1992, as a full-time (40 hours per week) data entry clerk. According to her entry on her time sheet of January 12, 1996, on January 8 "PART TIME STATUS BEGINS." This change was memorialized in a letter to her from Fiscal Officer Russell A. Pomeroy dated January 5, 1995, stating that the reduced hours were caused by budget concerns and that the "schedule may change depending on the work load and any special projects that need completing in a specific time frame."

Although she was a union supporter, and this occurred prior to trial of the extensive consolidated complaint in Case–7–CA–37182, it was not alleged as an unfair labor practice.

In any event, she then worked 3 days (24 hours) per week until October 1996. From the week beginning October 10 through January 31, 1997, she worked 5 days a week, except for holidays; however, nothing on her timesheets indicates that she had been changed from a part-time to a full-time employee. She made an entry on the February 7 timesheet under the date of February 6 "LAYOFF STARTS—PARTTIME STATUS."

Since Feliczak had been working 5 days a week from the end of October, the General Counsel alleges that by reducing her to 3 days a week the Respondent violated Section 8(a)(3) and (4). I disagree.

Although the Respondent has committed massive and persistent unfair labor practices, this does not prove that all management decisions affecting supporters of the Union are unlawful. Placing Feliczak on part-time status in January 1996 was implicitly acknowledged as lawful. When that occurred, Pomeroy wrote that the schedule would change if Feliczak had special projects which needed completing; and this, according to the testimony of both Feliczak and Pomeroy is exactly what happened in October. Feliczak told Pomeroy she was behind and needed more hours. By January it was no longer necessary for Feliczak to work extra hours.

I base this conclusion on the credited testimony of Pomeroy and the fact that the General Counsel offered no evidence to the contrary other than Feliczak's vague testimony that there was work for her to do. Though I realize Pomeroy's testimony was to some extent discredited by Judge Fish in the earlier case, here I found him credible. Further, he is no longer an employee of the Respondent and has no apparent stake in the outcome of this proceeding.

b. February 13 suspension

One of the files Feliczak had on her computer was the Nutrition Update Report. She had put a password on this file, so that it could not be accessed by others. On Friday, February 7, a day she was not scheduled to work, the Respondent wanted access to that file. Theresa Lombard, the executive secretary and an alleged supervisor and agent of the Respondent, called Feliczak asking for the password. Feliczak did not give it to Lombard, variously claiming that Lombard was not her direct supervisor and that she could not remember the password.

Later that day, Pomeroy called asking for the password, but Feliczak was not home. When she retrieved the message from

Pomeroy from her answering machine she decided not to return the call because she felt it was "too late." She did not give the password until she returned to work the following Monday.

Pomeroy wrote a memo to Feliczak on February 10 concerning this matter, which Feliczak answered that day, generally admitting the above facts. In one paragraph of her memo, Feliczak stated both that she could not remember the password when Lombard called, but she would have given it to Pomeroy. Pomeroy responded on February 13, stating that her explanation was not acceptable, and as she had been previously warned about "inappropriate behavior during working hours," she was being placed on suspension for 6 working days.

On February 12, Kathy Connelly, disability services coordinator, wrote a memo to Melba White concerning Feliczak, which was relied on by Pomeroy in determining to suspend Feliczak. In part, Connelly reported that Feliczak "informed me that I believe on Friday, February 7, 1997, she received phone calls from Teresa and Russ (Pomeroy) wanting to know passwords for the computer in order to access information. Her remark was to the affect [sic] that she 'got them.'" Citing *Yesterday's Children, Inc.,* 321 NLRB 766 (1996), counsel for the General Counsel argues that if during a discussion between employees protected by Section 7 nothing that is said can be used a basis for discipline. I find nothing in *Yesterday's Children* supporting such a proposition, nor do I know of any authority to this effect. If, as I find, Feliczak bragged to Connelly that she had "got them" with regard to not giving the password, such evidence of her attitude could reasonably be considered by the Respondent, notwithstanding that the comment was stated in a protected conversation.

Although Feliczak disclaims that she had previously been told not to put passwords on files, I believe she was. But more importantly, when called by a clearly responsible official of the Respondent for the Nutrition Update Report password, her refusal to give it was serious insubordination, which I believe, she felt was clever. A 6-day suspension for such an act does not seem so unreasonable as to imply a hidden motive. Union activity does not immunize one for disobeying reasonable orders of superiors. I therefore conclude that the General Counsel did not establish an unlawful motive when Pomeroy suspended Feliczak on February 13, 1997.

c. Prohibition and restriction on movement

When Feliczak returned to work on March 3, Pomeroy met with her, according to his testimony, in order to clarify her work duties and responsibilities. He memorialized this meeting in a letter wherein he stated that she was not to loiter and disrupt other staff; was to stay at her work station; and that he had received complaints from other staff about her bothering them. He further stated that her "employment status is probationary and there will be no more warnings;" and finally, that she was to submit a summary of her accomplishments at the end of each day.

Although Pomeroy's testimony that he had received complaints from other employees was vague, nevertheless it is not unlawful for an employer to expect employees to work during working hours and to have a policy that they write daily summaries. Pomeroy's statements concerning these matters do not amount to unlawful restrictions.

However, I conclude that by placing Feliczak on probation, Pomeroy punished her because of her union activity and the union activity in general. The Respondent offered no justification for such discipline, nor evidence that other employees of similar tenure have been placed on probation. Feliczak was disciplined for the insubordination of not giving the password, but by March 3 that discipline was complete.

Given that Feliczak was a union supporter, and that placing her on probation was singular and severe discipline, I conclude that the General Counsel established prima facie that the motivating cause was the union activity. Therefore the burden was on the Respondent to show that the same discipline would have occurred even absent the union activity. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The Respondent did not meet its burden. I conclude that by placing Feliczak on probation on March 3, 1997, the Respondent violated Section 8(a)(3) of the Act. This is also alleged to have been violative of Section 8(a)(4); however, since Feliczak did not participate in any of the Board proceedings (though she was subpoenaed) it is difficult to find a separate 8(a)(4) motive.

d. Elimination of the data entry clerk position

In early April, Pomeroy told Feliczak that the Respondent was going to install computers in all the county offices, thereby making a central data processor unnecessary. By letter of April 8, Pomeroy informed that this process had been completed and as she had finished a project she had been working on, her last day would be April 9. He stated: "Since the data processing position is being eliminated, this layoff will be indefinite. However, you may apply for openings in other position we may have in the future."

The Respondent did not notify the Union of its intention to eliminate Feliczak's job, though after the fact, counsel for the Respondent wrote the union's agent offering to bargain over the effects.

The General Counsel alleges that elimination of Feliczak's job was violative of Section 8(a)(3), (4), and (5). The basis for the General Counsel's argument that the Respondent's action was discriminatorily motivated is that the new computers in the county office were not hooked into a system; therefore, data from the county offices would still have to be entered manually into the central computer operated by Feliczak. I find this to be factually inaccurate. I credit Pomeroy that data from the county offices is downloaded onto diskettes and the data is thus transferred to the central computer. Such does not require the manual reentry of data.

Though Feliczak apparently did special projects on occasion, her primary job was to enter data received from the county offices. With this work eliminated, it seems reasonable that her job would no longer be necessary. Moving data entry to the sites where data is gathered does not seem so unreasonable as to suggest an unlawful motive. It is noted that in the termination letter, Pomery stated that Feliczak would be conisdered for future job openings. She learned of such openings but did not apply. On this record, there is insufficient basis to conclude

that had she applied she would not have been hired. Thus I conclude that the General Counsel did not establish that the change in the Respondent's operation was violative of Section 8(a)(3) and (4).

3. Allegations involving Melissa Kukla by April Foley

a. Delay in furnishing materials

As noted above, the General Counsel sought and received in Federal district court injunctive relief under Section 10(j) of the Act. Included in the court's order of April 15, 1996, was that Kukla and other alleged discriminatees be considered for future teacher positions. On February 3, 1997, the General Counsel filed a petition for contempt alleging that Kukla and others had not in fact been considered for open teacher positions for which they were qualified. This came on for hearing in June, and was resolved when the Respondent agreed to offer Kukla a teacher position for the school year 1997–1998. She received such an offer on September 2.

It is first alleged that beginning August 28, 1997, April Foley, director, Fountain Child Development Center, "withheld from its employee Melissa Kukla and delayed delivery of materials necessary for the performance of work, including the curriculum."

Kukla was assigned as a classroom teacher at the Fountain Center under the supervision of Foley. Kukla testified that from August 28 to September 2 she asked Foley on three occasions for 1997–1998 curriculum, and each time Foley told her she did not have a copy of it. Foley admitted the essence of this exchange, but further testified that at the time they were working on the curriculum and it was not yet completed. Kukla was in fact given a copy of the curriculum for the previous year.

On these facts I cannot conclude that the Respondent denied Kukla materials necessary for the performance of her work in violation of the Act.

The General Counsel also argues that Kukla was not allowed to use the "previously approved lesson plan" for the first week, which had been done by the teacher whom she replaced. There is no evidence to support this assertion, nor was it alleged as an unfair labor practice. Kukla was told that this plan had not been approved (as was the Respondent's policy) and that if she wanted to use it, it would have to be submitted. Apparently Kukla did so, and the plan was approved.

I conclude that the Respondent did in fact place a restriction on her. This is trivial and petty, but nevertheless in keeping with the general intransigeance of the Respondent. I conclude that the Respondent harassed Kukla as alleged in paragraph 13 (a).

b. Rescinding permission for time off

Kukla was known to the Respondent to be a member of the employee negotiating committee. She was informed that there would be bargaining sessions on September 22 and October 31. Thus on September 11, Kukla requested personal time off for those days. At first, Foley told her that October 31 was approved, since it was a Friday and there were no children at school on Fridays. However, September 22 would not be approved unless Kukla could find a substitute. Then by memo dated September 12, Foley denied the request for time off on grounds that "there is nothing in the Personnel & Policies Procedure Handbook regarding Personal Business Time." (This statement by Foley is curious inasmuch as Kukla's request was on a FiveCAP form entitled "Request for Personal Business Time.")

Undisputedly, the Respondent denied Kukla's request for time off to be present at negotiation sessions at a time agreed to by Executive Director Mary Trucks. Such is clear interference with employees' right to engage in protected activity, and on the facts here, in retaliation to Kukla's protected activity and is, as alleged, violative of Section 8(a)(1), (3), and (4).

c. Requiring a subpoena and a physician's note.

In September Kukla learned that another hearing would be held before the Federal district court in Grand Rapids on October 15 and that the Board would subpoena her as a witness. She so informed Foley, who told her to bring in the subpoena when she got it and then file a request for time off. The hearing date was subsequently changed to October 14. The subpoena was sent by registered mail, but she could not pick it up on October 13 because the postoffice was closed for a Federal holiday.

Kukla went to the hearing on October 14 without having first taken the subpoena to Foley. The next day she was also off work having called in sick. She went to her chiropractor. On October 16 she reported for work but Foley would not allow her to work until she had brought in the subpoena and doctor's note.

Melba White, the director of Child and Development Services and the Respondent's principal witness here, testified that it was at her direction that Kukla was required to furnish the subpoena and doctor's report before being allowed to return to work. White testified that she was "(j)ust following agency policies—the documentation."

It is alleged that on October 16, the Respondent "required a physician's note and a copy of a subpoena previously furnished to Respondent's counsel as conditions precedent to Melissa Kukla's return to work."

Kukla in fact procured the subpoena and doctor's statement and returned them to Foley, a process, which took about 1-1/2 hours. She was allowed to work.

Although requiring one who is to be absent for a court proceeding to tender a subpoena is not unreasonable, that such was the established policy of the Respondent is not supported by the documentary evidence here. Specifically, there is nothing in the *FiveCAP, Inc. Personnel Policies & Procedures* which states such a policy. Concerning a doctor's statement for being off work 1 or 2 days, White's testimony is at odds with the written policy:

> The Executive Director may require a statement from a physician at the employee's expense, when:
>
> > an employee has been on sick leave for three (3) consecutive days.
> >
> > an employee has demonstrated a pattern of absence due to illness.

an employee has a reported chronic condition affecting the employees work and attendance.

I do not credit White and her unsupported conclusionary statement concerning the Respondent's policy. I conclude that it was not established policy for the Respondent to require Kukla to bring in her subpoena or doctor's statement before being allowed to return to work on October 17. I conclude she would not have been so required had it not been for her participation in the union activity in general and specifically the District Court proceeding on October 14. Indeed, this proceeding was specifically concerned with Kukla's status. I conclude that the Respondent thereby violated Section 8(a)(1), (3), and (4) of the Act.

d. Disciplinary warning

By memorandum dated October 16, White issued a disciplinary warning to Kukla stating that the Respondent's policy required "anyone going to be a subpoenaed witness must provide documentation *prior* to failing to attend work. She noted that Kukla had not done so and "(I)n the future, failure to provide the required documentation in advance, may result in disciplinary action."

As noted above, the evidence suggests, and I conclude, that this "policy" was an ad hoc creation by White. That Kukla was going to be absent for the court hearing involving the Respondent was well known and indeed Kukla had so advised Foley in September. Thus the asserted reason for the "policy" (so that we may, with sufficient notice, attempt to plan for and fill your classroom duties) is not germane here. As with earlier statement given to Kukla concerning her performance, I conclude that this warning was an attempt by the Respondent to build a record against Kukla and was violative of Section 8(a)(1), (3), and (4) of the Act.[2]

e. Rescinding approval for personal time

On November 17 Kukla submitted a request for personal time off for 1-1/2 hours on January 5, 1998, in order to take her son to a physician to evaluate a chronic hearing problem. The time requested was from 1:30 to 3 p.m. Foley approved the request then later that day told Kukla that White had rescinded the approval on grounds that for Kukla to leave at 1:30 would mean that the children would be without their regular teacher for 15 minutes. Therefore, Kukla would be required to take off the entire day of January 5 without pay.

On these facts, that White rescinded approval for Kukla's 1-1/2 hour request for time off, given 6 weeks in advance, is so irrational that I infer a hidden motive. *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466 (9th Cir. 1966). I conclude that the reason White rescinded Foley's approval for the time off was because of Kukla's union activity. This act of White's again amounts to petty harassment in violation of Section 8(a)(1), (3) and (4) of the Act.

f. Alleging theft

On Friday February 6, the Respondent received a donation of 95 carpet samples at the Fountain Center. On Saturday February 7 Kukla, and her assistant, went to the center to arrange their classroom for Monday. They were able to enter the school because Kukla, as other teachers, had a key. They took some of the new carpet samples for the classroom, and placed the older ones in the basement with other carpet samples.

In the afternoon of Saturday, Foley went by the center and discovered, she testified that some of the new carpet samples were missing. Foley reported this to White who instructed Foley to report it to the sheriff. Foley did so, and gave Kukla's name as a suspect since Kukla had been at the center that day. Foley called Kukla, leaving a message on Kukla's answering machine and Kukla returned the call, but they did not talk about this Saturday. Foley also had the locks changed on Saturday.

On Sunday a deputy sheriff came to Kukla's home to investigate. They went to the center, only to discover that the locks had been changed. In any event, the deputy finally determined that of the 45 samples reported stolen, he could account for all but a few.

It is alleged, and I find, that by naming Kukla as a suspect for the alleged theft of carpet samples, the Respondent harassed her in violation of Section 8(a)(1), and discriminated against her in violation of Section 8(a)(3) and (4). First, the Respondent's evidence that in fact some carpet samples were stolen is inadequate. The Respondent has not offered any rational basis why anyone would steal carpet samples, much less Kukla. They have, at best, limited value and limited use. To have suggested that some were taken by Kukla without any supporting evidence, was clearly to make life difficult for her and not for any legitimate purpose. Such is consistent with the Respondent's past actions and was unlawful.

g. The classroom door

It is alleged that on February 9, the Respondent imposed on Kukla "a new requirement that she keep open the door to her classroom when children were not present so she could be more closely observed by April Foley."

Foley testified that she told the teachers on Monday, February 9 that they would have to keep the doors open to their classrooms when students were not present (Fridays and after the children had gone on other days). She testified that the reason for this newly instituted rule, "They would all congregate in there Robin, Laurie from Pam's class would be in there and Pam's work wasn't getting done in her room because Laurie'd be in Melissa's room having coffee and chit-chatting." There is no evidence to support Foley's assertion that Kukla and others were gathering in her classroom "chit-chatting" or anything else. To the contrary, the credible testimony from Laurie Koviak and Jan Miller is that employees did not congregate in Kukla's classroom.

Although I discredit Foley's asserted basis for instituting the rule that classroom doors must remain open when children were not in school, in normal circumstances the Respondent might

[2] She was also given a letter dated November 12 from Foley stating that her attendance was a "concern" inasmuch as she had been absent 14 hours—the court hearing and the chiropractor. This was followed by a letter dated December 1, stating, "This is a warning that your attendance is a problem." Neither letter was alleged to be an unlawful warning. To conclude these warnings were fully litigated and constituted violations of the Act would not add to the remedy here.

lawfully do so. However, here there is no question but that Foley intended to convey to Kukla that she was being closely watched because of her position as a reinstated employee and active supporter of the Union. In the context of this matter, I conclude that Foley's statement violated Section 8(a)(1), (3), and (4) the Act.

h. Reassigning Kukla

In late February 1998, the Respondent consolidated the three classrooms at the Fountain Center into two, and reassigned Kukla to be an assistant in Foley's room, with Pam Jolly keeping the other room. According to the Respondent, while enrollment had been low from the beginning of the school year, in early February Foley recommended that the three classrooms be consolidated. Foley testified that she decided to let Jolly teach by herself, notwithstanding she had less experience than Kukla, since Jolly had experience teaching large numbers of children.

On Wednesday, February 18, Foley met with the entire staff of the Fountain Center and told them of her decision to consolidate classrooms and lay off some employees. She said there would be more details the next day. On February 19, Foley again met with the staff and announced that a kitchen aide and teacher's aide would be laid off. Kukla's children were going to Jolly's room, and some of Jolley's children were going to Foley's room. Kukla would be an assistant to Foley, though keeping her teacher pay and benefits. Foley also announced that Kukla and an aide would be splitting kitchen aide duties. They were advised not to tell the children or their parents of the forthcoming changes, which were to be effective Monday, February 22.

A letter dated February 17 from White to the parents noted that the enrollment at the Fountain Center was 34, whereas the center was contracted to serve 52 children. Thus, the Respondent would be combining classes. That evening, at a special meeting of the Policy Council (which is made up of parents from the various centers served by the Respondent) a motion was made and passed that two staff members at Fountain Center would be laid off and the three classrooms be combined into two. Two members of the Policy Council were present. Twenty were absent including all three representing the Fountain Center.

Kukla argued against this shift on grounds that it would adversely affect the children and indeed, according to Kukla's credible testimony, it did. Moving small children from one teacher to another during the school year is bound to have an adverse affect, which the Respondent does not dispute. Further, it is difficult to understand what the Respondent hoped to gain by consolidating classes when it did. There were only 11 weeks left in the school year, yet enrollment had been less than that for which the Center was funded since September.

On February 17 there had been no change in circumstances suggesting consolidation of classrooms; yet the Respondent did so and sought to give this decision an aura of considered rationality by calling a special meeting of the Policy Council to discuss and pass a resolution for consolidation. This was clearly bogus, since only 2 of 22 members were present, and neither was a parent of a Fountain Center child. Nevertheless White testified that the decision to consolidate was not her's "solely —it's—we got the recommendation from the policy council." In fact, she testified that the special meeting of Februay 17, the Policy Council made the decision to consolidate the classrooms and lay off two employees. This is incredible testimony. The decision had been made prior to the special meeting of the Policy Council. If in fact White intended to seek and rely on a recommendation of the Policy Council, or that the Policy Council in fact made the decision, she would not have sent the letter before the Policy Council meeting. Further, a decision of such importance would not have rested on the results of a meeting at which only 2 of 22 members were present.

Ruth McClullen is a volunteer at the Fountain Center and has a grandchild enrolled there. On learning of the decision to consolidate, she contacted White to find out why the Respondent had waited until so late in the school year. White told her only that "it was a matter of good business management and had to be done." McClullen further testified that White told that "money was not an issue at the time it was a matter of good business management."

Janice Brower is also a volunteer at the Fountain Center. She also asked White about the decision to consolidate so late in the school year. "And I also had asked Melba (White) if this was a monetary decision, that they had to do this because the school needed to save money and her exact words were absolutely not."

Though the Respondent can make a rational argument for consolidating classes based on enrollment, it is clear from this testimony that the decision was not based on economics. Indeed Counsel for the Respondent argued, infra, that the decision was not based on labor costs. Nor was the decision based on a considered recommendation of the Policy Council. Therefore, the decision must have been based on a motive the Respondent seeks to hide. Other centers were also low in enrollment, yet only the Fountain Center was involved. Kukla's status was the subject of the district court hearing on October 14, and the Judge's decision in January. I therefore conclude that the Respondent's motive in consolidating classrooms was in retaliation for the employees' union activity and Kukla's part in the 10(j) matter. By this the Respondent violated Section 8(a)(3) and (4) of the Act.[3]

i. Withholding and limiting the assistance of teacher aides

As set forth in more detail below, separating Kukla from her children was the final act resulting in her constructive discharge. Subsequently, the Federal Magistrate concluded that Kukla's constructive discharge was violative of the restraining order under Section 10(j) and the Respondent was ordered to reinstate Kukla to her position as lead teacher.

The General Counsel argues that upon her return, Kukla was denied the assistance of an aide, notwithstanding that her classroom had been dismantled and she could reasonably have used help. The Respondent contends that there was only one aide available for the three teachers at the time and that aide was

[3] The two layoffs resulting from this action were not alleged violations of the Act and were not litigated.

assigned to help prepare from some type of federally mandated inspection.

The General Counsel does not dispute the facts stated by the Respondent. On these facts, to conclude that somehow Kukla was discriminatorily denied the help of an aide is simply too subjective on which to base finding a violation of the Act. Therefore, I conclude that the General Counsel did not establish the violation alleged in paragraph 13(i).

j. Excluding Kukla from a staff meeting

The General Counsel's evidence on this paragraph is Kukla's testimony that Foley told her that she and Jolly did not need to attend the staff meeting on April 3. Kukla told Foley that the meeting was on "attention deficit" and she wanted to attend. "April (Foley) told me that Melba (White) said that I could attend the staff training if I wanted to, but that I did not need to attend the osprey [sic] meeting.[4] That she would go to that and come back and go over the information with Pam Jolly and me."

She testified that going back to the place of the meeting that afternoon she saw Jolly's car. Therefore, the General Counsel alleges that Kukla was discriminatorily denied access to a staff meeting. I find these facts insufficient to base a violation of the Act.

Further, Foley testified that she had forgotten some material and called Jolly to bring it to her. There is no reason to disbelieve this. I do not believe that somehow Jolly was given a benefit denied to Kukla and I will recommend that paragraph 13(j) be dismissed.

4. Allegation of September 10, 1997

It is alleged that on September 10, 1997, the Respondent required Kukla to give advance notice before coming to the main office at Scottville and restricted her movement and access to equipment and supplies. This allegation concerns the time when Kukla went to the main office in Scottville to have some classroom material laminated. Kukla testified that she called in advance, since it takes 30 minutes for the laminator to warm up. She arrived at the Scottville office, signed in and went to the basement and contacted Kathy Connolly-Gibson, who was in charge of the equipment. She helped Connolly do the project and in fact finished it while Connolly went elsewhere. Kukla testified that Connolly told her "that in the future if I needed things laminated, I needed to send them to the office, and it was her job, I'm not to come and do that." It is alleged that the Respondent thereby placed restrictions on an employee's movement in order to retaliate for her union activity.

White testified that this restriction applied to everyone and that it was because the laminator and copy machine were on the same circuit and somehow the Respondent was having trouble with the copier. (An exhibit offered by the Respondent shows four service calls for the copier in September.) White was generally not a very credible witness and her testimony on this subject was vague and general. There is no documentary evidence to support White's testimony that a policy was made and announced to all employees and that it was necessary in order to maintain control over employees and equipment. That the Respondent had regular service performed on the copier does not suggest a reason why employees could not come to the Scottville office to have material laminated. In the normal course of business, and absent union activity, it appears more likely than not that employees could do as Kukla did on September 10—call in advance, come to the office and help laminate material.

I therefore conclude that this petty restriction on Kukla was to retaliate against her for her union activity and because she had participated in the Board cases against the Respondent and had been ordered reinstated as alleged in paragraph 14. The Respondent thereby violated Section 8(a)(3) and (4).

5. Requiring a second physician's note on October 17, 1997

For the reasons stated in paragraph 3(c) above, I conclude that White's requirement that Kukla procure a second physician's note as a condition precedent to returning to work on October 17, was unlawful in violation of Section 8(a)(3) and (4).

6. Scrutinizing and criticizing the work of Kukla

Bernadine Staffen is an education coordinator, whose job is, among other things, to critique teachers' lesson plans, classrooms, and teaching methods. It is alleged that her review of Kukla's room on November 10, 1997, amounted to disparate treatment of Kukla.

Kukla testified that all the Fountain Center classrooms were monitored on November 10, and that this is done twice annually. Kukla testified that Staffen did the actual monitoring of her classroom, with White "in there part of the time, and different people did April Foley and Pam Jolly's classroom." Kukla testified that as part of the monitoring, her classroom was videotaped. "All day" she testified, though the Respondent offered into evidence the tape asserting it is but 11 minutes.

Apparently the General Counsel does not contend that monitoring Kukla's classroom was itself a violation of the Act. The General Counsel argues that the videotaping was unlawful and that Staffen's criticisms were "unfair" and therefore unlawful.

Unquestionably for the Respondent to monitor the classrooms of its teachers from time to time is not unlawful. Even union activists can be supervised. Thus the issue is whether the use of a TV camera is unlawful and whether criticisms which Kukla thought were unwarranted somehow vitiates otherwise lawful supervision. I conclude not, even in the fact situation here. To accept the General Counsel's argument would require me, on the basis of limited facts and expertise in teaching preschool children, to evaluate the critique of Kukla's classroom and teaching methods. Such, of course, would be a subjective evaluation. Nor is there evidence that other teachers were not also criticized in some respects. Finally, the critique was used, so far as I can tell, to enhance Kukla's effectiveness. No discipline of any kind was attached. Other than the TV camera, the monitoring was no different in kind than had been the case previously. Nor do I find the use of a TV camera to be unlawful. To the contrary, such can be an effective training tool—allowing a teacher to see herself in action.

[4] From the Respondent's brief this is OSPRI, an acronym for some kind of federally mandated inspection of Head Start Centers.

In short, I conclude the facts do not support finding a violation based on November 10 visit of Kukla's classroom by Staffen and I shall recommend that paragraph 16 be dismissed.

7. The constructive discharge of Kukla on February 19, 1998

It is alleged that the acts of the Respondent set for in paragraphs 3(a) through (h) caused the termination of Kukla. The unlawful consolidation of classes at the Fountain Center resulted in demoting Kukla (notwithstanding that her pay remained the same) and taking from her children which had been her responsibility from the beginning of the school year. In addition to being assigned as an assistant to Foley, Kukla was also directed to perform duties as a kitchen aid, work she had not previously been required to do as a lead teacher. I believe her testimony that this, and the effect on the children, substantially affected her.

Kukla called in sick on Monday, February 22, but came to work on Tuesday. A number of her children came to her and asked if they had to go to Jolly's room and some of them cried. Kukla then told Foley that she could not work under these conditions and "and I told her I would be back after this was settled in court."

She saw her physician on February 24, who wrote the following note: "Off work because of severe anxiety because of work problems and separation from usual class of children. Will be off until after court hearing." On February 29 Kukla returned to the Fountain Center and gave Foley the note. The Respondent treated Kukla as having quit her job, whereas Kukla wrote that she simply intended to stay off work until the situation could be rectified. And she subsequently did return to work following a hearing before a Federal magistrate, the General Counsel having moved that the Kukla's leaving her job was a result of actions by the Respondent in violation of the district court's January order under Section 10(j).

The Board has long held that an employee who leaves the job may be found to have been constructively discharged in violation of the Act if, (a) the burdens imposed on the employee caused, and were intended to cause, a change in working conditions so unpleasant as to force her to resign and (b) these burdens were imposed because of the employee's union or other protected activity. E.g., *Davis Electric Wallingford Corp.,* 318 NLRB 375 (1995). I conclude these two elements have been established.

In addition to the petty harassment of Kukla outlined above, continuing unabated from the time she was reinstated until she left the job in February, the Respondent made a substantial and adverse change in her work situation. Although she continued to be paid as a lead teacher, she was separated from the children she had taught the previous 6 months and her status became essentially one of assistant teacher. I believe, and conclude, this move by the Respondent was in retaliation for her participation in the Board and court proceedings as well as her activity on behalf of the Union. And, I conclude that these actions by the Respondent were calculated to make life so unpleasant for Kukla that she would quit her job. Such, I conclude, was a constructive discharge in violation of Section 8(a)(3) and (4) of the Act. The fact that she was subsequently reinstated following a hearing before the Federal magistrate does not remedy this unfair labor practice.

8. Refusal to bargain

It is alleged that eliminating the data entry clerk position and consolidating the classrooms without notice to the Union, or giving the Union a chance to bargain over these decisions, the Respondent violated Section 8(a)(5) of the Act. I agree.

Unquestionably the Respondent did not notify the Union, much less bargain about eliminating the data entry clerk position. Such is a clear violation of Section 8(a)(5). *Taos Health Systems,* 319 NLRB 1361 fn. 2 (1995): "[w]e emphasize that once a specific job has been included within the scope of the unit by either Board action or the consent of the parties, the employer cannot remove the position without first securing the consent of the union or the Board."

The Respondent's after-the-fact offer to bargain over the effects of its action does not cure its unlawful elimination of the position. Therefore, I shall recommend that Feliczak's position be restored, that she be offered the job and that she be made whole for any losses she may have suffered.

The Respondent argues that its decision to consolidate the classrooms did not turn on labor costs, therefore it did not have to bargain over the decision, citing *First National Maintenance Corp. v. NLRB,* 452 U.S. 666 (1981). I conclude that the reasoning of *First National Maintenance* is not applicable to this situation. Here the Respondent did not make a fundamental change in the scope and direction of its enterprise. It simply consolidated three work units into two, eliminating two jobs. But there was no change in the type of service or those served. There was, however, a change in personal duties and a reduction in the number of worker-hours. These are items about which the Union, as the representative of the bargaining unit, could reasonably bargain about. Therefore, I conclude that the Respondent had a duty to bargain, which it breached. *Detroit News,* 319 NLRB 262 (1995).

The Respondent also argues that its decision was found by the Federal Magistrate to have been violative of the court's injunction and it was required to rescind it. Since Kukla was returned to her classroom, the matter is moot. It may be that the remedy is affected by the subsequent decision of the Magistrate; however, this does not mean that the unfair labor practice has been cured.

REMEDY

Having concluded that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action, including offering reinstatement to Florence Feliczak and making whole her and Melissa Kukla for any loss of wages and other benefits they may have suffered as a result of the Respondent's unfair labor practices in accordance with the formula set forth in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), and *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]